FILED
AUG 13 195
HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 258

UNITED STATES OF AMERICA EX REL. VINCENZO CARROLLO, ALSO KNOWN AS CHARLES V. CARROLLO, PETITIONER,

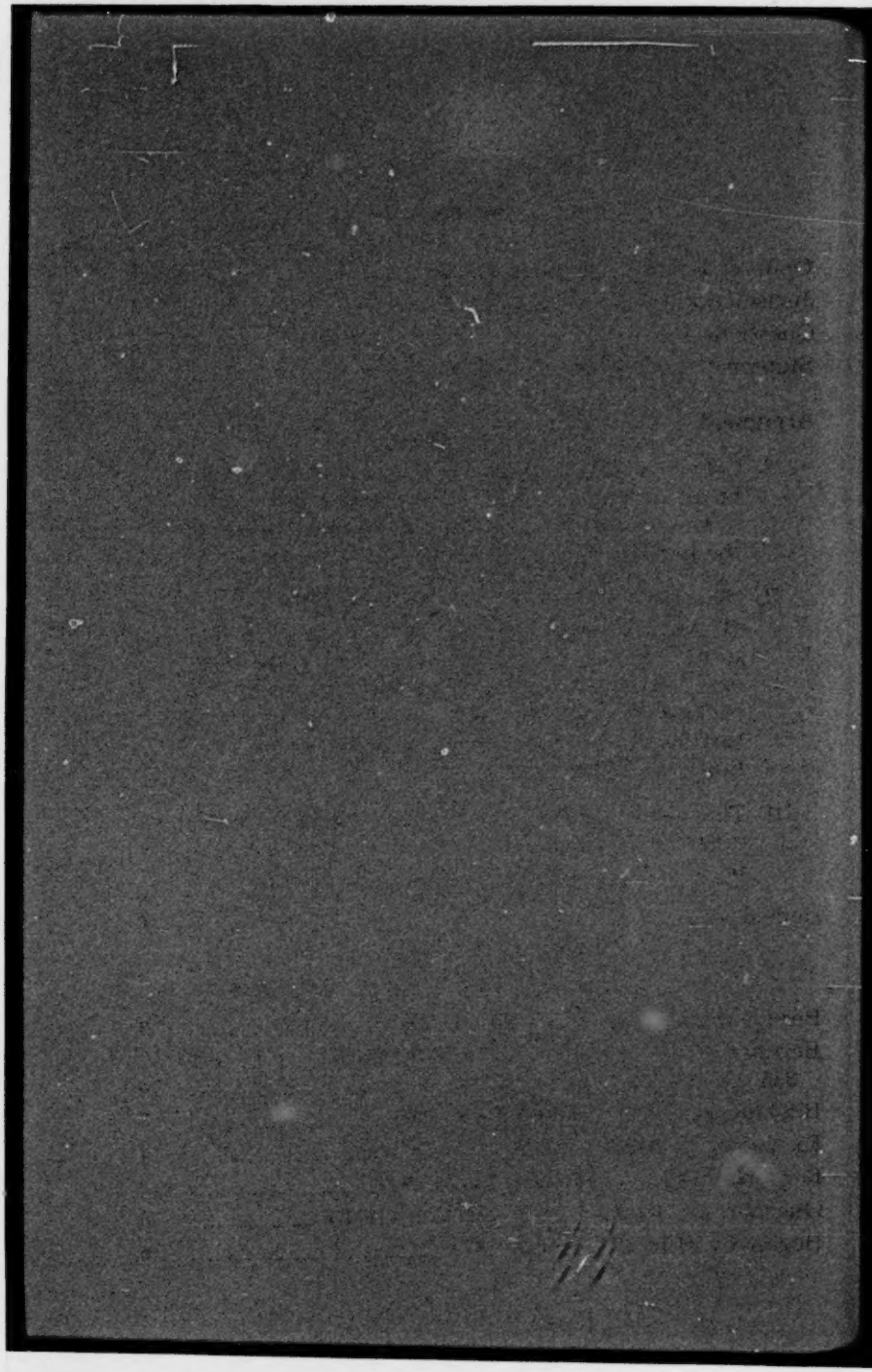
VS.

A. H. BODE, DISTRICT DIRECTOR IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONER.

RICHARD P. SHANAHAN,
711 Commerce Building,
Kansas City, Missouri,
JAMES DALEO,
711 Commerce Building,
Kansas City, Missouri,
Attorneys for Petitioner.



INDEX

Opinion Below 1
Jurisdiction 2
Questions Presented 2
Statement of Case 2

Argument—

I. Conspiracy to engage in the wholesale liquor business is not a crime involving moral turpitude within the meaning of Section 19(a) of the Immigration Act of 1917 (8 U. S. C. 155a) 5

II. "Warrant for Arrest" and "Warrant-Deportation of Alien" which charged petitioner with conspiracy to engage in the wholesale liquor business and which declared petitioner deportable because this offense was a crime involving moral turpitude are insufficient and defective, and therefore invalid 11

III. The Court of Appeals for the Eighth Circuit erred in declaring petitioner deportable because he was a "repeater" 15

Conclusion 16

Table of Cases

Bermann vs. Reimer, 123 F. 2d 331 (1941) 8
Bernhardt vs. United States, 169 F. 2d 983, cert. den. 335 U. S. 903 16
Bilokumsky vs. Todd, 263 U. S. 149 13
Ex parte T. Nagata, 11 F. 2d 178, 180 ..... 12, 13, 14
Fong Haw Tan vs. Phelan, 333 U. S. 6 12
Guarneri vs. Kessler, 98 F. 2d 580 (1938) 8
Hogan vs. Hill, 12 F. Supp. 873 15

Jordan vs. DeGeorge, 341 U. S. 223 ..... 2, 7, 9
Kwock Jan Fat vs. White, 253 U. S. 454 13
Lewis vs. Frick, 233 U. S. 291 13
Maiti vs. Haff, 116 F. 2d 337 (1940) 8
Matter of H ....., 1 I. & N. Dec., 394 (B. I. A., 1943) 6, 9
McNealy vs. Johnston, 100 F. 2d 280 15
Mercer vs. Lence, 96 F. 2d 122 (1938) 8
Takeo Tadano vs. Manney, 160 F. 2d 665 15
Throumoulopolou vs. United States, 3 F. 2d 803 13
U. S. ex rel. Andreacchi vs. Curran, 38 F. 2d 498 10
U. S. ex rel. Berlandi vs. Reimer, 113 F. 2d 429 (1940) 8
U. S. vs. Carrollo, 30 F. Supp. 3, 6, 7 10
U. S. ex rel. Guarino vs. Uhl, 107 F. 2d 399, 400 10
U. S. ex rel. Iorio vs. Day, 34 F. 2d 920 15
U. S. ex rel. Manzella vs. Zimmerman, 71 F. Supp. 534, 537, 538 10
U. S. ex rel. Popoff vs. Reimer, 79 F. 2d 513 (1935) 8
U. S. ex rel. Portada vs. Day, 16 F. 2d 328 (1926) 8
United States ex rel. Carrollo vs. A. H. Bode, 204 F. 2d 220 ..... 5, 11
Ponzi vs. Ward, 7 F. Supp. 736 (1934) 8
Zakonaite vs. Wolf, 226 U. S. 272 13

TEXT AND STATUTES

24 C. J. S., Sec. 1585 15
8 U. S. C. 155a 4, 5, 11
18 U. S. C. 231 3
18 U. S. C. 336 3
18 U. S. C. 371 ..... 2, 4
26 U. S. C. 145b 3
26 U. S. C. 3253 ..... 2, 4, 6, 8, 9, 11, 13
26 U. S. C. 3321 7
28 U. S. C. 1254 2
28 U. S. C. 2101 2

Supreme Court of the United States

OCTOBER TERM, 1953.

No. _____.

UNITED STATES OF AMERICA EX REL. VINCENZO CARROLLO, ALSO KNOWN AS CHARLES V. CARROLLO, PETITIONER,

VS.

A. H. BODE, DISTRICT DIRECTOR IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONER.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 65) is reported at 204 F. 2d 220. The District Court wrote no opinion but the findings of the District Court are found in the record at pages 60, 61, and 62.

JURISDICTION.

Judgment of the Court of Appeals was entered on April 28, 1953 (R. 65), and rehearing was denied on May 19, 1953 (R. 77). The jurisdiction of this court is invoked under 28 U. S. C. 1254 and 28 U. S. C. 2101.

QUESTIONS PRESENTED.

I.

Where petitioner was convicted of the crime of conspiracy to engage in the wholesale liquor business (18 U. S. C. 371; 26 U. S. C. 3253) and was not convicted of conspiracy to defraud the government, was the former offense one involving moral turpitude within the meaning of this court's decision in *Jordan* v. *DeGeorge*, 341 U. S. 223?

II.

Is it a correct statement of the law for the Court of Appeals to hold that an alien is deportable because he is a "repeater" (See Decision Below 204 F. 2d 220, 223).

STATEMENT OF CASE.

The petitioner, Vincenzo Carrollo, also known as Charles V. Carrollo, on the 24th day of January, 1906, when he was 3 years and 5 months of age, entered this country at New Orleans, Louisiana. On the 17th day of November, 1923, he married Caroline DiMaggio, a citizen of the United States, and to this marriage six children were born—five daughters and one son. Three daughters are married and two daughters and one son are at home.

The three children at home are minors—daughter age 14, son age 5 and daughter age 4. The petitioner has resided in the United States since January 24, 1906 (R. 39).

On October 20, 1939, in the District Court of the United States for the Western District of Missouri in case No. 14,578 petitioner, having been convicted of the offense, to-wit: "wilfully, falsely, corruptly and feloniously committing wilful and corrupt perjury" (18 U. S. C. 231), was sentenced for a period of four (4) years without costs (R. 57); on the same date and in the same court in case No. 14,581 petitioner, having been convicted of the offense, to-wit: "depositing in the Post Office of the United States one certain letter concerning a certain gift enterprise and scheme similar to a lottery" (18 U. S. C. 336), was sentenced for a period of one (1) year and one (1) day, said sentence to be served consecutively and not concurrently, with the sentence imposed against petitioner in case No. 14,578, without costs (R. 58); on the same day in the same court in case No. 14,639 petitioner, having been convicted of the offense, to-wit: "attempting to defeat and evade a part of his income tax" (26 U. S. C. 145b), was sentenced for a period of three (3) years on Count III to be served consecutively with the sentences imposed in cases 14,578 and 14,581, and three (3) years on Count IV to be served concurrently with the sentence imposed on Count III (R. 59).

On July 7, 1950, in the District Court of the United States for the Western District of Missouri in case No. 17,749 petitioner, having been convicted of the offense, to-wit: "conspiring to engage in the wholesale liquor business, and at the same time, wilfully failing to pay the special tax required to be paid by wholesale liquor dealers as charged in Count I, and engaging in the wholesale liquor business, and at the same time, wilfully failing to

pay the special tax required by law to be paid by wholesale liquor dealers as charged in Count II (R. 20)" (18 U. S. C. 371; 26 U. S. C. 3253), was sentenced for a period of two (2) years on Count I and fined one thousand dollars ($1,000.00) on Count I; and for the period of two (2) years on Count II to run concurrently with sentence imposed on Count I and an additional fine of $100.00 on Count II (R. 21).

Petitioner has served sentence imposed on October 20, 1939, and has served sentence imposed on July 7, 1950, and is now at liberty on bond.

Warrant for arrest of Alien was issued and proceedings for his deportation were commenced on September 7, 1950, pursuant to the provisions of the Immigration Act of 1917 (8 U. S. C. 155a). This section provided for (R. 18) the deportation of any alien who, subsequent to May 1, 1917, is sentenced more than once to imprisonment for one year or more because of conviction in this country of any crime involving moral turpitude committed at any time after entry.

Petitioner was a prisoner in the U. S. Penitentiary at Leavenworth, Kansas, when warrant for his arrest was served and proceedings for deportation were commenced. The final hearing was held the 16th day of March, 1951, at said institution, and on May 10, 1951, the hearing officer concluded that petitioner was subject to deportation and ordered that he be deported from the United States on the charge stated in the warrant of arrest (R. 43).

Appeal was taken to the Board of Immigration Appeals. Decision of Board of Immigration Appeals rendered December 7, 1951, dismissing said appeal (R. 47). Warrant-deportation of alien was issued by appellee on December 21, 1951 (R. 52).

On the 12th day of June, 1952, application for writ of habeas corpus was filed in the United States District Court of the Western District of Missouri, Western Division, and a show cause order was issued thereon (R. 6, 7).

On the 19th day of June, 1952, the Honorable Albert L. Reeves, judge of said court, dismissed the application for a writ of habeas corpus (R. 63) and from that decision petitioner appealed to the United States Court of Appeals for the Eighth Circuit.

On April 28, 1953, the Court of Appeals rendered its decision affirming ruling of the District Court and on May 19, 1953, final judgment was entered by the Court of Appeals denying rehearing (R. 77). From this decision Petitioner seeks a writ of certiorari by this court to the Court of Appeals for the Eighth Circuit.

ARGUMENT.

I.

Conspiracy to Engage in the Wholesale Liquor Business Is Not a Crime Involving Moral Turpitude Within the Meaning of Section 19(a) of the Immigration Act of 1917 (8 U. S. C. 155a).

Petitioner submits that the language of the Court of Appeals at page 222 of its opinion (204 F. 2d 220), is of vital importance.

> But we think the unequivocal declaration by the Supreme Court "that the crime of conspiring to defraud the United States is a "crime involving moral turpitude'" requires this court to hold that when this appellant plead guilty to that very crime and was sentenced for conspiring to defraud the United

States he brought himself within the statute that requires his deportation.

Using the DeGeorge case, therefore, as its authority, the Court of Appeals has held that Carrollo was convicted in 1950 of conspiracy to defraud the government and is therefore deportable and this conclusion is reached despite the clear and unmistakable fact (R. 20) that Carrollo was found guilty of, and sentenced for, conspiring to engage in the wholesale liquor business. It would almost seem that the court below is declaring that conspiracy to defraud the United States and conspiracy to commit an offense against the United States are one and the same crime. If this were correct a conspiracy to commit a violation of the National Motor Vehicle Theft Act could likewise be held to be a conspiracy to defraud the United States.

The fallacy of such an argument, of course, is obvious. In respect to his conviction in 1950, petitioner was convicted on two counts. The first count related to the conspiracy to violate Section 3253, Title 26, U. S. C., and the second count related to the substantive violation of Section 3253 in that he did engage in the business of a wholesale liquor dealer without paying the required tax. Now, with respect to this second count the Immigration and Naturalization Service has unequivocally stated that such an offense does not involve moral turpitude (*Matter of H*....., 1 I. & N. Dec., 394 (B. I. A., 1943). But because Carrollo was also convicted for conspiracy to violate this substantive law, it was then concluded by the court below that the petitioner had been convicted of conspiracy to defraud the United States. The decision of this court in the DeGeorge case does not warrant any such conclusion. An examination of that decision demonstrates simply and clearly that there the court was deal-

ing with a statute (26 U. S. C. 3321) which is captioned "REMOVAL OR CONCEALMENT WITH INTENT TO DEFRAUD THE REVENUE." In providing fines and imprisonment for persons removing or concealing goods or commodities the law in that instance also contained the following specific clause: "with intent to defraud the United States." Chief Justice Vincent in commencing his opinion (pp. 223, 224) states as follows:

> This case presents only one question, whether conspiracy to defraud the United States of taxes on distilled spirits is a "crime involving moral turpitude within the meaning of Section 19(a) of the Immigration Act of 1917."

Then, after reviewing various decisions dealing with the term "moral turpitude," he states (p. 229) "in view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American Courts have, without exception, included such crimes within the scope of moral turpitude. It is therefore clear, under an unbroken course of judicial decisions, that the crime of conspiracy to defraud the United States is a 'crime involving moral turpitude.' " And again at page 232 of his opinion, "* * * the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. * * * Fraud is the touchstone by which this case should be judged."

Petitioner has no quarrel with this reasoning and hastens to point out that other cases cited by the Supreme Court in the DeGeorge case as authority for its position were likewise dealing with conspiracies to violate laws of the United States by performing some act or acts *with intent to defraud the United States* (Italics Supplied).

In *U. S. ex rel. Berlandi* v. *Reimer*, 113 F. 2d 429 (1940), and *Maita* v. *Haff*, 116 F. 2d 337 (1940), Courts of Appeals specifically decided that the crime of conspiracy to violate the Internal Revenue laws by possessing and concealing distilled spirits with intent to defraud the United States of taxes involves moral turpitude. Furthermore, in *Guarneri* v. *Kessler*, 98 F. 2d 580 (1938), the Court of Appeals held that the crime of smuggling alcohol into the United States with intent to defraud the United States involves moral turpitude. Likewise in other deportation cases where fraud has been proved federal courts have held that the crime in issue involved moral turpitude.

Bermann v. *Reimer*, 123 F. 2d 331 (1941).
Mercer v. *Lence*, 96 F. 2d 122 (1938).
U. S. ex rel. Popoff v. *Reimer*, 79 F. 2d 513 (1935).
Ponzi v. *Ward*, 7 F. Supp. 736 (1934).
U. S. ex rel. Portada v. *Day*, 16 F. 2d 328 (1926).

The above cases dealt with a variety of offenses such as obtaining goods under false pretenses, conspiracy to defraud by deceit and falsehood, forgery with intent to defraud, using the mails to defraud, and issuing checks with intent to defraud. In all instances it appears clear and unmistakable that the moral turpitude involved in the crime has its origin in, or springs from, the fraud, or intent to defraud specifically set out in the statute.

In the instant case we are dealing with a criminal statute punishing one who engages in the wholesale liquor business and at the same time wilfully fails to pay the tax required to be paid by wholesale liquor dealers (26 U. S. C. 3253). Nowhere in its provisions is there any reference to fraud against the United States or an intent to defraud the United States. These words are not only conspicuous by their absence but their omission clearly indicates that Congress in delineating this offense did not intend it to be

construed as such. If Congress had intended to punish persons engaging in the business of a wholesale liquor dealer, with an intent to defraud the United States, Congress would have said so in the statute. Congress has done so countless times in other provisions of the code (see cases cited directly above).

In dismissing petitioner's appeal the Board of Immigration Appeals makes particular reference to this distinction in referring to the charge in the warrant upon which it seeks to deport this petitioner (R. 47).

> "It may be observed that the appropriate findings of fact and conclusions of law should have described the second crime more fully by designating it as a crime of conspiracy to commit an offense against and to defraud the United States in violation of 18 U. S. C. 371 and 26 U. S. C. 3253."

But the respondent has not charged petitioner with the deportable offense of conspiring to defraud the United States. Respondent contends that petitioner is subject to deportation because he conspired to commit a substantive crime which the respondent itself states is an offense which does not involve moral turpitude (R. 49). The case at bar therefore is clearly not within the purview of the *DeGeorge case, supra,* since by the language of the statute itself (26 U. S. C. 3253) petitioner is not charged with conspiracy to commit an offense against the United States with intent to defraud.

Section 3253 of the Internal Revenue Code which Carrollo was convicted of conspiring to violate, is merely a revenue or licensing statute, to use the exact words of the Board of Immigration Appeals, in *Matter of H*_____, *supra,* and therefore its violation is not an offense involving moral turpitude.

In reaching this conclusion the Board cited *U. S. ex rel. Andreacchi* v. *Curran*, 38 F. 2d 498, where the court held that violation of the Harrison Anti-Narcotic Act (38 Stat. 785, 26 U. S. C. 211, 691-707) by an alien did not involve moral turpitude within the meaning of the Immigration Act of 1917. The court's language is as follows at page 499 of the opinion:

> "The crime consists not in engaging in narcotic traffic, but in merely failing to register, pay a tax and comply with certain regulations of the Internal Revenue Commissioner. It is to be regarded solely as a revenue act whatever incidental results might accompany its enforcement. No case has been brought to my attention, nor do I find any which holds that the violation of a revenue or licensing statute involves moral turpitude. The fact that the thing may be done, providing a tax is paid to the government, indicates that the act itself does not involve moral turpitude."

The Board of Immigration Appeals then goes farther and says:

> "The situation here presented is distinguishable from that before the court in *Maita* v. *Haff*, 116 F. 2d 337, in which it was held that an alien who had been convicted on a charge of engaging in the business of distilling alcohol with intent to defraud the United States of the tax on the spirits distilled, had committed a crime involving moral turpitude."

The case at bar is, therefore, likewise distinguishable and not a deportable offense.

See also:

U. S. ex rel. Manzella v. *Zimmerman*, 71 F. Supp. 534, 537, 538.

U. S. v. *Carrollo*, 30 F. Supp. 3, 6, 7.

U. S. ex rel. Guarino v. *Uhl*, 107 F. 2d 399, 400.

Before leaving this point it should be pointed out again that the court below declared (p. 222) that Carrollo was *sentenced* (italics supplied) for conspiracy to defraud the United States. To demonstrate this definite mistake, attention of this court is again respectfully directed to pages 20 and 21 of the record where it shows that Carrollo was sentenced for conspiracy to engage in the wholesale liquor business. In this same connection the attention of the court is also directed to the footnote at page 221 of the decision below where the court in speaking of Section 3253 of Title 26, U. S. C., states as follows:

> Apparently the "special tax" involved was the tax of $100.00 on wholesale liquor dealers under 26 U. S. C. 3250(a)(1), amended and raised to $200.00 on October 20, 1951.

While it is not urged as controlling the writer would be remiss if he failed to request this court to observe that the petitioner herein has been declared deportable for the failure to pay $100.00 for a wholesale liquor license.

II.

"Warrant for Arrest" and "Warrant-Deportation of Alien" Which Charged Petitioner with Conspiracy to Engage in the Wholesale Liquor Business and Which Declared Petitioner Deportable Because This Offense Was a Crime Involving Moral Turpitude Are Insufficient and Defective and Therefore Invalid.

Condensing the language of the warrant, petitioner is held to be subject to deportation under Section 19(a) of the Immigration Act of 1917 (8 U. S. C. 155a) for the following reasons, to-wit: that he has been sentenced more than once to imprisonment for terms of one year or

more because of convictions since his entry into the United States of crimes involving moral turpitude. These sentencings are:

1. In 1939 for the crime of willful perjury, and

2. In 1950 for the crime of conspiracy to engage in the wholesale liquor business without paying the tax and also for the substantive offense of engaging in the wholesale liquor business without paying the tax.

This warrant that calls for the deportation of the petitioner, then, is based on the fact that he was sentenced on two different occasions and not on the premise that he may have been convicted more than once for the commission of crimes involving moral turpitude.

Fong Haw Tan v. *Phelan*, 333 U. S. 6.

Under this warrant petitioner was taken into custody by respondent, and against this warrant petitioner directed his application for habeas corpus (R. 1-6) on the ground that the warrant is fatally defective in that the crime for which he was sentenced the second time, that is in 1950, was not a crime involving moral turpitude (petitioner in this brief admits that the crime of wilful perjury is one involving moral turpitude and therefore directs his appeal on this point solely to the crime involved in the second sentencing). By this warrant and this warrant alone respondent seeks to deport petitioner and it is settled law that deportation under this warrant can only be made for the cause charged and stated therein. The decision of the Immigration and Naturalization Service in issuing a warrant of deportation is final and conclusive on the courts, provided there is some evidence to sustain the conclusion made. If there is no such evidence, then the decision is deemed to be arbitrary and unlawful.

Ex parte T. Nagata, 11 F. 2d 178, 180.

Throumoulopolou v. *United States*, 3 F. 2d 803.
Lewis v. *Frick*, 233 U. S. 291.
Zakonaite v. *Wolf*, 226 U. S. 272.
Kwock Jan Fat v. *White*, 253 U. S. 454.
Bilokumsky v. *Todd*, 263 U. S. 149.

In discharging the petitioner in the *Nagata case, supra*, the court concluded with this language:

> "Here the admitted facts do not justify the order of deportation; hence the order is arbitrary within the meaning of the decisions. It is ordered that petitioner be discharged and his bond exonerated. This order is without prejudice to any further proceedings that the immigration officers may desire to institute against the alien on a new or different charge (Italics supplied) than that stated in the warrant of deportation herein referred to."

In the instant case the court in passing judgment on petitioner in 1950 (R. 20, 21) stated in its judgment that he was convicted of conspiring to engage in the wholesale liquor business and sentenced him to the maximum term which, under the conspiracy statute could not exceed the maximum punishment provided for the misdemeanor which was the object of the conspiracy (R. 40). It is vital to note that the language of the indictment was "to commit an offense against and to defraud the United States, in violating Section 3253, Title 26, U. S. C." (R. 24) but that the judgment of the court upon which this warrant is based declared that petitioner had been convicted of conspiring to commit a misdemeanor. Respondent, therefore, in issuing the warrant charged the petitioner pursuant to such judgment which, as we have seen under Point I of this Argument, is a conviction of an offense not involving moral turpitude. When this defect became apparent to the Board of Immigration Appeals it is no

wonder that the Chairman in dismissing the appeal makes the observation that

> "the appropriate findings of fact and conclusion of law should have described the second crime more fully by designating it as a crime of conspiracy to commit an offense against and to defraud the United States in violation of 18 U. S. C. 371 and 26 U. S. C. 3253" (R. 47).

It is vigorously urged by petitioner that respondent could not charge the crime of conspiracy to defraud the United States in the warrant because petitioner had not been found guilty and had not been sentenced in 1950 for that offense.

At the time application for a writ of habeas corpus was argued in the District Court counsel for petitioner pointed out that if this warrant were to serve as the means of deporting petitioner it would have to be corrected at least to show that petitioner was sentenced a second time for a deportable offense as stated in the *Negata case, supra*. Further proceedings could have been instituted by the Immigration officers on a new or different charge than that stated in the warrant of deportation then under consideration. No amendment or change has been made in the warrant in this case. The position of the respondent is that of an executive officer of the government attempting to deport an alien on a charge that is not contained in the warrant but on one which he wishes had been in the warrant and on a charge which he desires the court to read into such warrant. Under the cases there is no evidence to sustain such a conclusion and therefore the decision of respondent in ordering deportation under this warrant is arbitrary and unlawful. The propriety of deportation must be determined solely from findings on which order of deportation is based.

U. S. ex rel. Iorio v. *Day*, 34 F. 2d 920, where the Court at page 922 used the following strong language:

> "Nevertheless, when Congress has specifically dealt with crime as a ground, and has defined what kinds are to be considered, it seems to us that we are not free to suppose that other crimes or the probability of other crimes is enough."

See also:

Takeo Tadano v. *Manney*, 160 F. 2d 665.
Hogan v. *Hill*, 12 F. Supp. 873.
McNealy v. *Johnston*, 100 F. 2d 280, 282.
24 C. J. S., Sec. 1585.

III.

The Court of Appeals for the Eighth Circuit Erred in Declaring Petitioner Deportable Because He Was a "Repeater."

It is respectfully submitted that in holding that it was the intent of Congress to deport "repeaters" (204 F. 2d 220, 223) the court below fell into the same error as the District Court in considering crimes and offenses other than those charged in the warrants. Like the District Court, the Court of Appeals would appear to be saying that an alien is subject to deportation if he has violated any statutes involving moral turpitude and has been convicted on these charges.

That is not the law. The law punishes an alien with deportation only when he has been sentenced more than once, that is at different times and on different occasions, for crimes involving moral turpitude. This is so, irrespective of how many statutes he has violated, and irrespective of how many times he had been convicted of crimes involving moral turpitude. This ruling principle finds no

clearer expression than in the language of the court in *Bernhardt* v. *United States,* 169 F. 2d 983, 985, cert. den. 335 U. S. 903:

> "The fear expressed by counsel that one of the appellants might be subject to deportation if the verdict of guilty on both informations is upheld, in view of the fact that he is an alien, would appear to be groundless in view of the decision in *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 7, 68 S. Ct. 374. The statute Section 19(a) of the Immigration Act of February 5, 1917, 8 U. S. C. A., Sec. 155(a), which renders a defendant deportable if twice convicted, was there interpreted to authorize deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, thereafter again commits a crime of that nature and is again convicted and sentenced for it. It does not apply when an alien is but once called before the bar and received judgment, *whether for one or several crimes*" (Italics supplied).

CONCLUSION.

Petitioner respectfully prays that the court issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eighth Circuit affirming the denial of a writ of habeas corpus by the United States District Court for the Western District of Missouri. As stated in the petition, the Court of Appeals has decided important questions of federal law which are in conflict not only with decisions of this court but with various circuit courts of appeals. It is respectfully urged that the question of deporting an alien because of a conviction of conspiring to commit a misdemeanor concerns a matter

so vital to life and liberty, and is so fraught with danger as to legal precedent that this court should review the judgment of the lower court and decide this question.

Respectfully submitted,

RICHARD P. SHANAHAN,
711 Commerce Building,
Kansas City, Missouri,
JAMES DALEO,
711 Commerce Building,
Kansas City, Missouri,
Attorneys for Petitioner.

BRIEF

FOR THE

RESPONDENTS

IN

OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	7
Conclusion	10

CITATIONS

CASES:

Fong Haw Tan v. *Phelan*, 333 U.S. 6 10
H. Matter of, 1 I. & N. Dec. 394 (1943) 8
Jordan v. *De George*, 341 U.S. 223 .....5, 7, 8, 9
Popoff, United States ex rel. v. *Reimer*, 79 F. 2d 513 8

STATUTES:

Act of February 5, 1917, c. 29, § 19(a), 39 Stat. 889, as amended [8 U.S.C. (1946 Ed.) 155(a)] 2, 7, 8
18 U.S.C. 371 3
26 U.S.C. (1934 Ed.) 1441 8
26 U.S.C. (1946 Ed.) 3253, 53 Stat. 391 ..... 3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 258

UNITED STATES OF AMERICA, EX REL. VINCENZO CARROLLO, ALSO KNOWN AS CHARLES V. CARROLLO, *Petitioner*

v.

A. H. BODE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 65-71) is reported at 204 F. 2d 220.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1953 (R. 72), and a petition

for rehearing was denied on May 19, 1953 (R. 73-77). The petition for a writ of certiorari was filed on August 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction, for conspiracy to defraud the United States by engaging in the wholesale liquor business and failing to pay the special tax required, involved moral turpitude within Section 19(a) of the Immigration Act of 1917, authorizing deportation of aliens.

2. Whether warrants for the arrest and deportation of petitioner were invalid as not containing sufficient allegations that a conviction on the conspiracy charge involved moral turpitude.

STATUTES INVOLVED

The Act of February 5, 1917, c. 29, § 19(a), 39 Stat. 889, as amended [8 U.S.C. (1946 Ed.) 155 (a)] provides:

> * * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral

turpitude, committed at any time after entry; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * *

26 U.S.C. [1946 Ed.] 3253, 53 Stat. 391, provides:

> Any person who shall carry on the business of a * * * wholesale liquor dealer * * * and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. * * *

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

The petition for certiorari seeks review of a judgment affirming the denial of petitioner's application for a writ of habeas corpus after a warrant for his deportation had issued.

Petitioner, a native of Italy, entered the United States at New Orleans, Louisiana, on January 24, 1906. He maintained continuous residence in this country, but did not become a United States citizen (R. 38, 39).

On October 20, 1939, in the United States District Court for the Western District of Missouri, he was sentenced to imprisonment for four years after being convicted of perjury under 18 U.S.C. 231 (R. 56-57). On the same day petitioner was given additional sentences by the same court for violations of 18 U.S.C. 336, covering use of the mails for a lottery scheme, and 26 U.S.C. 145(b), for attempting to evade income taxes (R. 57-60).

On June 26, 1950, in the same court, petitioner pleaded guilty to a charge of conspiracy (alleging 70 overt acts) "to commit an offense against and to defraud the United States, in violating Section 3253, Title 26 U.S.C." by carrying on the business of a wholesale liquor dealer and wilfully failing to pay the special tax required to be paid by wholesale liquor dealers (R. 20, 24-25). He also pleaded guilty to a second count charging the substantive offense of carrying on the business of wholesale liquor dealer and wilfully failing to pay

the required special tax (R. 20, 36-37). He was sentenced on July 7, 1950, to imprisonment for two years and a $1,000 fine under count one, and under count two, to imprisonment for two years, to run concurrently with the sentence under count one, and a $100 fine (R. 21).

On September 7, 1950, a warrant was issued for petitioner's arrest and deportation under Section 19(a) of the Immigration Act of 1917 (8 U.S.C. 155(a)) (R. 22-23). A hearing officer decided that petitioner should be deported on the ground that he had been sentenced more than once for crimes involving moral turpitude, namely, perjury and "conspiracy to engage in the wholesale liquor business, and at the same time, wilfully failing to pay the special tax required to be paid, and [the substantive offense of] engaging in the wholesale liquor business and * * * wilfully failing to pay the special tax required by law to be paid by wholesale liquor dealers" (R. 38-43). In ordering the denial of petitioner's application for suspension of deportation, the Assistant Commissioner of the Adjudications Division adopted the recommendation of the hearing officer, but eliminated reference to the substantive offense of engaging in the wholesale liquor business as not being a crime involving moral turpitude (R. 48-50). On December 7, 1951, the Board of Immigration Appeals dismissed petitioner's appeal (R. 44-47). After ruling that under *Jordan* v. *De*

George, 341 U. S. 223, the conspiracy conviction involved moral turpitude, the Board's opinion observed "that the appropriate findings of fact and conclusion of law should have described the second crime more fully by designating it as a crime of conspiracy to commit an offense against and to defraud the United States in violation of 18 U. S. C. 371 and 26 U. S. C. 3253" (R. 47).

A warrant was issued on December 21, 1951, for petitioner's deportation (R. 51-52). On June 12, 1952, petitioner filed a petition for habeas corpus in the United States District Court for the Western District of Missouri, claiming that the warrant of deportation was fatally defective. As grounds for this claim, petitioner contended that he had been convicted of only one crime "involving moral turpitude" (perjury in 1939), since his 1950 conviction—for conspiracy and the substantive offense of unlawfully engaging in the wholesale liquor business without paying the required tax—did not involve moral turpitude (R. 1-5). A show cause order was issued, after which a response was filed to the order, and a traverse to the response (R. 6-11, 12-13).

After a hearing, the trial judge denied the application for habeas corpus, concluding that the warrant was valid in that each of the two offenses it specified involved moral turpitude (R. 14, 62). On appeal, the judgment was unanimously affirmed (R. 15, 72).

ARGUMENT

Petitioner's principal contention (Pet. 6-7, Br. 5-11) -that his conviction on July 7, 1950, was not for a crime involving moral turpitude[1]—is refuted by this Court's decision in *Jordan* v. *De George,* 341 U.S. 223. The indictment to which petitioner pleaded guilty in 1950 alleged that he and other named persons had unlawfully conspired "to commit an offense against and to defraud the United States, in violating Section 3253, Title 26 U. S. C. by * * * carrying on the business of a wholesale liquor dealer * * * while, at the same time, wilfully failing to pay the special tax required to be paid by wholesale liquor dealers" (R. 24-25). Petitioner was, therefore, convicted of conspiring "to defraud the United States" in the manner detailed in the indictment. Since this Court had unequivocally held in *Jordan* v. *De George, supra,* at 229, that the "crime of conspiring to defraud the United States is a 'crime involving moral turpitude'," the court below correctly held (R. 69) that petitioner's conviction on the conspiracy count involved moral turpitude, so that it, together with his conviction for perjury in 1939, authorized his deportation under 8 U. S. C. 155(a).[2]

---

[1] Petitioner concedes (Br. 12) that his perjury conviction in 1939 was for a crime involving moral turpitude.

[2] Petitioner's conviction on count 2 of the 1950 indictment, the substantive count under 26 U. S. C. 3253, is not pertinent

Petitioner seeks to avoid the force of the *De George* case by pointing out that 26 U. S. C. 3253 does not expressly use the phrase "defraud the United States." Consequently, according to petitioner, he was not convicted of a crime involving a conspiracy to defraud the United States—or, what matters here, of "a crime involving moral turpitude" within the meaning of 8 U. S. C. 155 (a).

While it is true, as petitioner points out (Pet. 6-7), that 26 U. S. C. (1934 Ed.) 1441, involved in *De George,* used the language "intent to defraud the United States," it does not follow that the failure to use such specific language in 26 U. S. C. 3253 means that there was no conspiracy to defraud the United States in this case.[3] The conspiracy to which petitioner pleaded guilty involved a planned and deliberate agreement to engage illegally in the wholesale liquor business and to defraud the

---

here. It was eliminated from consideration as one of the two convictions required for deportation by the Assistant Commissioner, the Board of Immigration Appeals, and the court below (R. 44-50, 65-71). The holding, therefore, in *Matter of H,* 1 I. & N. Dec. 394 (1943), that a substantive violation under 26 U. S. C. 3253 does not involve moral turpitude is irrelevant. Moreover, that holding is inconsistent with this Court's later decision in *Jordan* v. *De George, supra.*

[3] *Cf. United States ex rel. Popoff* v. *Reimer,* 79 F. 2d 513 (C. A. 2), where the statute involved did not mention fraud, but the court stated (79 F. 2d at 515) that the appellant's crime "necessarily involved aiding the applicant [for naturalization] to commit a fraud upon the government," and held that conviction for the crime involved moral turpitude within the purview of the deportation statute.

United States by nonpayment of liquor tax. The close similarity between this and the conspiracy in *De George* to evade the tax on distilled spirits is immediately apparent. The plain fact is that, although identical statutes covering the substantive offenses are not involved, the element of fraud is no less present here than it was in *De George*. That decision, involving an offense which differs factually in no material respect from the one in this case, shows conclusively the propriety of the holding below that petitioner's crime involved "moral turpitude."

2. Petitioner's corollary contention (Pet. 8, Br. 11-14), that the warrants for his arrest and deportation were invalid since they denominated the 1950 conspiracy conviction a crime involving moral turpitude when it actually was not, is in substance a restatement of the argument we have answered in subdivision 1, *supra*. Even though the warrants did not elaborate upon all the elements of the conspiracy charge by expressly mentioning a defrauding of the United States, they did, in the words of the court below, "accomplish a sufficient identification of the case in which the sentencing occurred and the indictment itself [charging conspiracy to defraud the United States and 70 overt acts] was always in evidence" (R. 71). Manifestly, petitioner was apprised with certainty of the fact that one of the crimes involving moral turpitude assigned as a basis for deportation was

the conspiracy to defraud the United States by engaging in the wholesale liquor business and failing to pay the required tax.[4]

CONCLUSION

This case was decided under established legal principles, and presents no question of sufficient importance to warrant further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

SEPTEMBER 1953.

---

[4] Petitioner, mistakenly contending (Pet. 8-9, Br. 15-16) that the decision below conflicts with *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, urges that the court below considered crimes and offenses other than those charged in the warrant as a basis for deportation. Under the *Fong Haw Tan* decision, if the only convictions against petitioner had been those for perjury, mail fraud, and income tax evasion, imposed at the same time on October 20, 1939, there would have been insufficient grounds for deportation. The record is clear, however, that the administrative officials and the court below did not use the mail fraud or income tax evasion conviction as a second conviction forming the basis for deportation. Only the perjury and conspiracy convictions, entered in 1939 and 1950, respectively, were held to be the grounds for deportation.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—269802/P.O. 289